(2)

Supreme Court, U.S.
FILED
MAY 2 8 1991
OFFICE OF THE CLERK

No. 90-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JACKIE D. MALONE,

Petitioner,

v.

GILMAN PAPER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

WALLACE E. HARRELL
Counsel of Record
GILBERT, HARRELL, GILBERT,
SUMERFORD & MARTIN, P.C.
777 Gloucester Street
Suite 200
Post Office Box 190
Brunswick, Georgia 31521-0190
(912) 265-6700

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

42p

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's first question poses the issue of whether the grant of a summary judgment is ever appropriate when Petitioner has filed a claim for damages based upon an alleged violation of Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1985).

2. Petitioner's second question simply is a request that this court review the record to determine whether or not the district court and the Eleventh Circuit Court of Appeals properly evaluated the evidence in determining whether Petitioner had rebutted Respondent's clear and unambiguous evidence that there was no causal link between Plaintiff's alleged discharge and his pension benefits. Inherent in this question is whether Petitioner's claim rises to the level of importance that this Court should grant writ of certiorari.

3. Even though the Eleventh Circuit Court of Appeals did not reach this issue, Respondent contends that the trial court was correct in holding that Petitioner had no claim since ERISA § 510 does not apply to vested pension plan participants.

PARTIES TO THE PROCEEDING

Respondent agrees with Petitioner's statement listing the parties to the proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING THE WRIT	4
I. A GRANT OF SUMMARY JUDGMENT IS APPROPRIATE WHEN PETITIONER HAS FILED A CLAIM UPON AN ALLEGED VIOLATION OF SECTION 510 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, 29 U.S.C. § 1140	4
II. PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER'S CLAIM DOES NOT QUALIFY UNDER THE STANDARD OF REVIEW OF THIS COURT IN GRANTING WRITS OF CERTIORARI	6
III. ERISA § 510 DOES NOT APPLY TO VESTED PENSION PLAN PARTICIPANTS	15
CONCLUSION	17

TABLE OF CONTENTS—Continued

APPENDIX: Page

DEPOSITION OF JACK MALONE 1a

MEETING WITH JACK MALONE 2a

AFFIDAVIT OF JACK MALONE 4a

DEPOSITION OF DOMINICK RALPH SORRENTINO 5a

DEPOSITION OF WILLIAM H. DAVIS 8a

DEPOSITION OF JOHN M. LOVE 10a

DEPOSITION OF MICHAEL PALLEN 14a

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 4

Baker v. Kaiser Aluminum and Chemical Corp., 608 F. Supp. 1315 (N.D. Cal. 1984) 5, 15

Corum v. Farm Credit Services, 628 F. Supp. 707 (D. Minn. 1986) 15

Dister v. Continental Group, Inc., 859 F.2d 1108 (2nd Cir. 1988) 5-6, 9, 12-14

Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987) 6, 9, 10, 12

Hayden v. First National Bank of Mt. Pleasant, Texas, 595 F.2d 994 (5th Cir. 1979) 4

Ingersoll-Rand Company v. McClendon, —— U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) 7-9

Johnson v. United Airlines, Inc., 680 F. Supp. 1425 (D. Hawaii 1987) 16

Kelly v. Chase Manhattan Bank, 717 F. Supp. 227 (S.D. N.Y. 1989) 16-17

Lujan v. National Wildlife Federation, —— U.S. ——, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ..... *passim*

Moehle v. N.L. Industries, Inc., 646 F. Supp. 769 (E.D. Mo. 1986), *aff'd. without op.* 845 F.2d 1027 (8th Cir. 1988) 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 9

Turner v. Schering-Plough Corp., 901 F.2d 335 (3rd Cir. 1990) 6, 14

West v. Butler, 621 F.2d 240 (6th Cir. 1980) 17

Statute:

Employee Retirement Income Security Act § 510, 29 U.S.C. § 1140 (1985) ..... *passim*

Rules:

Fed. R. Civ. P. 56 2

J. Moore, Moore's Federal Practice Rules Pamphlet, Rules of the Supreme Court of the United States, Rule 10(1) (1991) 6, 7, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1734

JACKIE D. MALONE,

Petitioner,

v.

GILMAN PAPER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent agrees that the opinion of the courts below are attached to Petitioner's petition.

JURISDICTION

Respondent agrees that Petitioner has properly stated the basis for jurisdiction of this court. Respondent denies that certiorari should be granted.

STATUTORY PROVISIONS INVOLVED

Respondent agrees that Petitioner has properly set forth the statutory provisions involved in the litigation that is the basis of Petitioner's complaint. *Rule 56 of the Federal Rules of Civil Procedure* as it relates to the burden of proof and the response required to a motion for summary judgment is also involved.

STATEMENT OF THE CASE

Respondent agrees to Petitioner's statement of the case except as follows:

Petitioner was employed by Respondent in its accounting department. (4a) In an effort to increase efficiency, eliminate duplication and reduce overhead, Respondent decided to reorganize and consolidate the accounting department in St. Marys, Georgia, part of which was located in New York City. (5a-7a) This resulted in the elimination of Petitioner's then existing position with Respondent. (5a-7a) Petitioner admits he was offered other options which included continued employment in the accounting department at a lower wage, but he contends it was offered in such a way that he concluded he would not be able to do the work. (1a-2a) The employees in New York were given different retirement options than Petitioner since they were going to be required to either retire if eligible or move from New York to Georgia in order to continue employment. (5a-6a)

Petitioner refers in his statement to employees of Respondent who had been employed at its "bag plant" and who were given different retirement options than he. The bag plant was being closed and those employees were going to be allowed to retire, if eligible, or required to move to another city of Georgia. (11a-12a)

It is undisputed that regardless of any action taken by Respondent relating to its pension plan for its em-

ployees, Petitioner's pension rights have been unaffected and in fact Petitioner is now receiving retirement benefits in accordance with the plan in effect when he was an employee before he retired. The pension rights of Petitioner had become vested and were not affected by his decision to take early retirement. (10a-11a)

SUMMARY OF ARGUMENT

1. The Supreme Court should deny Petitioner's Writ for Certiorari since the first question presented by Petitioner merely contends that there can be no summary judgment granted when Petitioner has filed a claim for damages alleging violation of Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. Sec. 1140 (1985). A summary judgment is appropriate in employment discrimination cases and specifically in ERISA § 510 cases. This court has clearly established summary judgment viability when the movant's state of mind is an element in the case.

2. Petitioner's writ of certiorari should be denied because Petitioner's claim does not rise to the level of importance that the Supreme Court typically requires. There is no conflict between the Court of Appeals decision and this court's interpretation of ERISA § 510 nor is there any conflict between the Eleventh Circuit Court of Appeals decision and any other circuit.

3. Petitioner's pension rights were fully vested at the time of his alleged termination and therefore he cannot invoke the protection of ERISA § 510.

REASONS FOR DENYING THE WRIT

I. A GRANT OF SUMMARY JUDGMENT IS APPROPRIATE WHEN PETITIONER HAS FILED A CLAIM UPON AN ALLEGED VIOLATION OF SECTION 510 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, 29 U.S.C. § 1140.

Petitioner contends in this petition for writ of certiorari that summary judgment cannot be granted when Petitioner has filed a claim for damages alleging a violation of Section 510 of the Employee Retirement Income Security Act, codified as 29 U.S.C. § 1140. He claims he is entitled to a jury trial. (Petitioner's Brief, pp. i, 8) In support of his contention, Petitioner cites *Hayden v. First National Bank of Mt. Pleasant, Texas*, 595 F.2d 994 (5th Cir. 1979) where the court stated that the granting of summary judgment in employment discrimination cases are questionable. (Petitioner's Brief, p. 8) However, no bar exists on the use of summary judgment in employment discrimination cases. Summary judgment is just as appropriate in employment discrimination, and more specifically, in ERISA § 510 cases as in other cases. Indeed, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), this court clearly established summary judgment viability in discrimination cases in holding that summary judgment may still be granted on the movant's motion in cases where the defendant's state of mind is an element in the case (as is the situation with employment discrimination cases). *Id.* at 2514, 2515. The court in *Anderson* held that as long as the movant meets his burden of showing no genuine issue of fact exists, the non-movant is *not* relieved of his own burden of producing evidence that establishes a genuine issue of fact to avoid the grant of a summary judgment, even when a party's state of mind is an issue. The non-movant must offer concrete evidence from which a reasonable juror could return a verdict in his favor. *Id.* at 2514.

The court in *Dister v. Continental Group, Inc.*, 59 F.2d 1108 (2nd Cir. 1988) applied the *Anderson* rule to an ERISA § 510 case and held that to avoid summary judgment a non-movant must offer " 'concrete evidence from which a reasonable juror could return a verdict in his favor' . . . and is not entitled to a trial simply because the determinative issue focuses upon the defendant's state of mind." *Id.* at 1114, quoting *Anderson* at 2514. The *Dister* court, citing *Nash v. Jaqueline Cochran, Inc.*, 548 F.Supp. 676, 678 (S.D. N.Y. 1982), also stated that the purpose of summary judgment—avoiding protracted, expensive, and harassing trials—apply equally to discrimination cases and other areas of litigation. *Id.* at 1114. In *Baker v. Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315 (D.C. Cal. 1984), the plaintiff brought an action against his employer under ERISA § 510 alleging interference with his pension rights due to wrongful discharge. In granting the defendant's motion for summary judgment, the court stated that "a party against whom summary judgment is sought is not entitled to trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." *Id.* at 1319, quoting *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed. 2d 754 (1976).

The purpose of summary judgment is to enable a party who believes there is no genuine dispute essential to the opponent's case to demand proof of a material disputed fact before lengthy litigation continues. *Lujan v. National Wildlife Federation*, —— U.S. ——, 110 S.Ct. 3177, 3188, 3189, 111 L.Ed.2d 695 (1990). This effective tool is as appropriate in ERISA § 510 cases as in other cases, and courts have established that the existence of an employer's state of mind and intent as a factor in a case does not preclude the use of summary judgment.

Indeed, lower courts have established manageable standards and allocations of burdens of proof in determining whether or not summary judgment should be granted in ERISA § 510 cases. Petitioner's contention would strip the courts of a tool that is beneficial to both the litigants and the court system and which the courts have proven competent to evaluate in ERISA § 510 actions. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2nd Cir. 1988), *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987), and *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3rd Cir. 1990) (all adopting variations of the test of indirect intent for the establishment of a prima facie case by this court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Therefore, Petitioner's contention that summary judgment is not applicable to ERISA § 510 cases is not meritorious.

II. PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER'S CLAIM DOES NOT QUALIFY UNDER THE STANDARD OF REVIEW OF THIS COURT IN GRANTING WRITS OF CERTIORARI.

Petitioner's writ of certiorari should be denied because the Petitioner's claim does not rise to the level of importance that the Supreme Court typically requires in granting certiorari to review a Court of Appeals decision. Rule 10(1) of the Rules of the Supreme Court states: "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." J. Moore, Moore's Federal Practice Rules Pamphlet, Rules of the Supreme Court of the United States, Rule 10(1) (1991). Petitioner's claim does not involve "special and important reasons" that Rule 10 requires. Both the United States District Court for the Southern District of Georgia and the United States Court of Appeals for the Eleventh Circuit in granting summary judgment to the defendant, found no meritorious claims

in the Petitioner's arguments. Indeed, in its order, the Court of Appeals held that the defendant met its burden of proof in showing that no causal link between the plaintiff's retirement and his pension benefits existed, while Petitioner presented no contrary evidence to Respondent's motion for summary judgment. Also, deposition testimony from defendant establishes that Petitioner was not terminated, but was given several options, including continued employment with defendant in a related capacity with reduced responsibilities and pay and retraining. However, plaintiff voluntarily elected to take early retirement. (1a-3a, 6a-7a, 12a-13a). Testimony from defendant's employees established that defendant's decision to reorganize the accounting department to enable it to operate more effectively was the purpose in offering plaintiff the options, and while Petitioner might contend he was "forced" to retire, no evidence exists to indicate the decision was made solely or even substantially for the purpose of avoiding pension liability. (5a-6a, 8a-9a, 11a-12a, 14a-15a).

Petitioner seems to claim that the decision of the Court of Appeals is in conflict with the Supreme Court's interpretation of ERISA § 510 in *Ingersoll-Rand Company v. McClenden*, ——U.S. ——, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), and therefore under Rule 10(1)(c) of the Rules of the Supreme Court, the conflict creates an important reason for granting a writ of certiorari. Contrary to Petitioner's claim, the decision of the Court of Appeals is not in conflict with this Court's interpretation of the purpose of ERISA § 510 in *Ingersoll-Rand Company*. *Ingersoll-Rand Company* held that the federal ERISA § 510 statute pre-empts state regulation when a right has been violated that is guaranteed by ERISA § 510. In *Ingersoll-Rand Company*, an employee of nine years was released four months before his pension would have vested. The employee sued in state court, and this court reversed the state supreme court decision,

ruling that state jurisdiction must yield to the federal enactment and should be decided under ERISA standards. *Id.* at 481-482, 485-486. In stating that ". . . this claim is prototypical of the kind Congress intended to cover under § 510", this court's interpretation of the purpose of ERISA § 510 is not in conflict with the Court of Appeals decision in the instant case. *Id.* at 485. Unlike the plaintiff in *Ingersoll-Rand Company*, Petitioner in the instant case was fully vested for all benefits to which he was entitled at the time of his retirement under Respondent's pension plan. Petitioner has only shown that if he had continued to work until the age of 65 instead of taking an early retirement, the benefits he would have received would have been greater than those which he is presently receiving and that, in effect, is a "savings" to Respondent. This, by itself, is not sufficient to create a cause of action since anytime any employee is discharged, the discharge results in a savings to an employer both in salary and pension costs. The Petitioner in the instant case has not established evidence that the Respondent had intent or purpose to interfere with Petitioner's pension rights. The Court of Appeals held that Petitioner presented no contrary evidence to defendant's evidence that no causal link between the Petitioner's retirement and pension benefits existed. (Petitioner's Brief, pp. A-3, A-4) Therefore, the Court of Appeals decision that the Petitioner had not met his burden of proof to establish any material issue of fact does not conflict with this court's interpretation of ERISA § 510, in holding that a case where an employee is terminated a few months before his pension vests is the type of case that Congress intended to cover under § 510 to protect "plan participants from termination motivated by an employer's desire to prevent a pension from vesting". *Id.* at 485. The primary issues of *Ingersoll-Rand Company* and the instant case differ. The Court of Appeals in the instant case has not decided Petitioner's ERISA claim in a way that conflicts with *Ingersoll-Rand Com-*

pany. Therefore, contrary to Petitioner's contention, the claim in the instant case does not meet the standard of review of the United States Supreme Court under Supreme Court Rule 10(1)(c).

The Eleventh Circuit Court of Appeals does not render the decision in the instant case in conflict with another Court of Appeals decision on the same matter, nor did the decision depart from the accepted and usual course of judicial proceedings for this court to grant writ of certiorari under Rule 10(1)(a) of the Rules of the Supreme Court. Although this question is apparently of first impression in the Eleventh Circuit, several circuits, in determining whether parties met their respective burdens of proof in a motion for summary judgment in ERISA § 510 cases, have adopted this Court's criteria for allocations of burden and order of presentation of proof for intent and motive elements. *See Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987) and *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2nd Cir. 1988). This court's criteria was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a Title VII case alleging discriminatory treatment. This criteria was summarized in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection . . ." Third, should defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination. *Burdine*, 450 U.S. at 252-253, 101 Sup. Ct. at 1093

(1981). (Quoting *McDonnell Douglas*, 411 U.S. at 802, 804, 93 Sup. Ct. at 1824, 1825).

Based on the analysis that follows, the decision in the instant case by the Eleventh Circuit Court of Appeals meets the criteria of these various tests, and therefore, the issues of this case do not meet the standard of review for a grant of a writ of certiorari to the United States Supreme Court under Rule 10(1)(a) of the Rules of the Supreme Court.

The Third Circuit Court of Appeals adopted the *McDonnell* framework in *Gavalik v. Continental Can Company*, 812 F.2d 834 (3rd Cir. 1987), and formulated requirements for the establishment of a *prima facie* case in ERISA § 510 cases similar to the requirements in *McDonnell*. The court held that "to establish a *prima facie* case under ERISA § 510, an employee must demonstrate (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may become entitled." *Gavalik* at 852. The plaintiff must establish his *prima facie* case by a preponderance of the evidence. *Gavalik* at 853.

Petitioner has not demonstrated by a preponderance of the evidence that Respondent engaged in prohibited conduct. Petitioner states in his brief that Petitioner was forced to retire because of unreasonable demands and conditions placed on him. (Petitioner's Brief, pp. 7, 8). However, Petitioner produces no evidence other than his own assertions of this claim. Deposition testimony from Gilman Paper Company employees, however, establishes that Petitioner was offered several options, one of which included continued employment with Gilman Paper Company in a somewhat different, but related capacity with reduced responsibility and pay. However, Petitioner voluntarily elected not to take the job, but rather to take retirement. Even if Petitioner's contention that he was

"forced" to retire is accepted (though in no way supported by any evidence before this court) there is still no showing that Petitioner's alleged forced retirement is related to his pension benefits and that he was forced to retire to save Respondent the cost of such benefits. (1a-3a, 6a-7a, 12a-13a).

In his brief, Petitioner also claims that the fact that Respondent changed pension plans and gave Petitioner several career options "created an inference that reducing the Petitioner's future pension benefits, which resulted in a correspondence cost reduction to the Respondent, was at least one of the motivating factors which caused the Respondent to force the Petitioner into early retirement". (Petitioner's Brief, pp. 7-8) However, Petitioner produces no evidence supporting these allegations. Petitioner has not established by a preponderance of the evidence that Respondent had intent or purpose to interfere with Petitioner's pension rights. Indeed, testimony from management level employees of the Respondent establishes that the decision to reorganize the accounting department was made as a result of a desire to enable it to operate more efficiently and cost effectively. (5a-6a, 8a-9a, 11a-12a, 14a-15a) There is no evidence to indicate that this decision was made solely, or even substantially, for the purpose of avoiding pension liability. Petitioner attempts to compare his situation with that of employees of the defendant's former grocery bag operation and with that of some of its New York-based employees. (Petitioner's Brief, pp. 4-5) Petitioner was not, and has not established himself to have been equally situated with employees of the grocery bag operations or with employees of the accounting department located in New York City. Petitioner was not employed in New York and did not work for the grocery bag operation. He was based at the papermill in St. Marys, Georgia. (4a) Even if he was similarly situated, Petitioner still has the burden of showing a causal link between his pension rights and

his discharge when Respondent has made an affirmative showing that his alleged "discharge" had nothing to do with his pension benefits.

Petitioner also submits as evidence of the Respondent's prohibited intentions the fact that Respondent terminated the overfunded pension plan in order to acquire the excess assets. (Petitioner's Brief, p. 7) However, Petitioner does not allege and cannot prove that the termination of the overfunded plan worked to the detriment of any plan participant. It is undisputed that plan participants rereceived and are receiving the benefits to which they are entitled. (9a) It is also undisputed that Respondent has established a new pension plan. (10a-11a) Therefore, Petitioner has failed to establish a *prima facie* case against Respondent, and the Eleventh Circuit Court of Appeals correctly granted Respondent summary judgment, not in opposition with the *prima facie* framework adopted by the *Gavalik* court.

The Second Circuit has also adopted the *McDonnell* framework and established a three-part test for plaintiffs to establish a *prima facie* case under ERISA § 510. To establish a *prima facie* case, the plaintiff must show that the plaintiff (1) belong to a protected group, (2) was qualified for the position, and (3) was discharged or denied employment under circumstances that give to an inference of discrimination. *Dister* at 1114-1115. The Petitioner does not establish a *prima facie* case under the *Dister* test because, as has already been discussed in the context of *Gayalik*, the Petitioner has failed to show by a preponderance of the evidence that he was discharged from his job. Petitioner claims that Respondent's business reason for the challenged practice was a pretext. (Petitioner's Brief, p. 8) The *Dister* court established a framework for judging pretext claims. In *Dister*, a fired employee sued under ERISA § 510 claiming he was released a few months before being eligible for benefits so that the company could avoid paying these benefits. The

court, under a *McDonnell* test, held that the plaintiff had the burden of proving, by a preponderance of the evidence, that defendant's legitimate, non-discriminatory reason for releasing plaintiff was pretext for discrimination. *Dister* at 1113, 1115. The defendant had asserted a corporate re-organization and a change in business priorities caused the release of plaintiff. *Id.* at 1115. The *Dister* court, citing *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095, stated, ". . . a plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence, that is, that the reason supplied was not the true reason for the unfavorable employment decision." *Id.* at 1113. *Dister* also cited *Lieberman v. Grant*, 630 F.2d 60, 65 (2nd Cir. 1980), stating ". . . pretext can be established by a showing that the asserted neutral basis was so ridden with error that the employer obviously could not honestly have relied on it." *Id.* at 1113. Even though the plaintiff in *Dister* had asserted inconsistencies in defendant's testimony and public speeches by defendant's executives as evidence of pretext in defendant's reasons for plaintiff's release, the court held that the plaintiff had failed to prove pretext by a preponderance of the evidence and had not met his burden, and so summary judgment for the defendant was properly granted. *Id.* at 1117.

Petitioner in the instant case produces no evidence or case law to substantiate his claim of pretext, with the exception of his own assertions. He has certainly not established by a preponderance of the evidence that Respondent's decision to increase efficiency and eliminate duplication in the accounting department was a pretext for prohibited action in violation of ERISA § 510. There is no evidence of inconsistencies in Respondent's assertion of legitimate business reasons in streamlining Respondent's accounting department. Indeed, Petitioner produces no evidence that Petitioner's added pension, had he remained with Gilman Paper Company, was a motivating

factor at all in Respondent's decision to create a more efficient accounting department. Therefore, Petitioner has not met his burden of proof, and under the *Dister* test, the Eleventh Circuit Court of Appeals properly affirmed summary judgment for the Respondent.

In *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3rd Cir. 1990), the court, applying the *McDonnell* test to an ERISA § 510 case, held that the plaintiff, who had worked for the defendant for 37 years before being released and who was not deprived of his pension, had not established a *prima facie* case to defeat a summary judgment motion. *Id.* at 348. The court stated:

> All Turner has shown is that his termination deprived him of the opportunity to accrue additional benefits through more years of employment. This kind of deprivation occurs whenever an ERISA employer discharges an employee and is not alone probative of an intent to interfere with pension rights. Where this is the only deprivation, a *prima facie* case requires some additional evidence suggesting that pension interference might have been a motivating factor. In this connection, we note that the record contains no evidence that the savings to the employer resulting from Turner's termination were of sufficient size that they may be realistically viewed as a motivating factor.

Id. at 348.

As in the *Turner* case, Petitioner in the instant case can only prove that the Petitioner no longer has the opportunity to accrue additional benefits through more years of employment. Ignoring the fact that Petitioner voluntarily chose to retire and prevent additional benefits from accruing, Petitioner has produced no evidence under the *Turner* standard to prove by a preponderance that Respondent's legitimate, non-discriminatory reason was pretext or that the savings to the Respondent resulting from Petitioner's early retirement were of sufficient size to

realistically be viewed as a motivating factor. The Eleventh Circuit Court of Appeals decision in the instant case is not in opposition to the *Turner* court's analysis of burden of proof responsibilities in summary judgment in ERISA § 510 cases involving employees whose benefits have vested. Petitioner has exhibited no evidence or cases that contradict this Eleventh Circuit Court of Appeals holding. However, Respondent has exhibited several Court of Appeals decisions from several circuits regarding summary judgment in ERISA § 510 cases that are not in opposition to the Eleventh Circuit Court of Appeals decision. Since the standard of review of the United States Supreme Court has not been met, the Order of the Court of Appeals should be upheld, and the writ of certiorari denied.

III. ERISA § 510 DOES NOT APPLY TO VESTED PENSION PLAN PARTICIPANTS.

Contrary to Petitioner's assertions, an examination of employer intent and the establishment of no causal link between Petitioner's retirement and his pension benefits are not necessary to determine that the Respondent is entitled to summary judgment. The petition for writ of certiorari should be denied because the petitioner has no cause of aciton under ERISA § 510. In granting summary judgment to the Respondent, the United States District Court for the Southern District of Georgia relied on a long line of cases from sister jurisdictions and properly concluded that an employee whose pension rights are vested at the time of his termination cannot invoke the protections of ERISA § 510. (Petitioner's Brief, pp. A-10-14)

In its Order, the District Court quoted and discussed the critical portions of *Baker v. Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315 (N.D. Cal. 1984), *Corum v. Farm Credit Services*, 628 F.Supp. 707 (D. Minn. 1986), and *Moehle v. N.L. Industries, Inc.*, 646

F.Supp. 769 (E.D. Mo. 1986), *aff'd. without op.* 845 F.2d 1027 (8th Cir. 1988). These cases involve suits subject to rulings pursuant to ERISA § 510 and are clear authority for the District Court's proposition that vested employees have no cause of action under § 510.

Other authority cited by the District Court, but not discussed in its Order, is equally persuasive, and shows that the weight of authority supports the District Court decision. The court cited *Johnson v. United Air Lines*, 680 F.Supp. 1425 (D. Hawaii 1987). The *Johnson* Court stated that because the plaintiff admitted during his deposition that he was fully vested in his company's pension plan at the time of his termination, to "the extent that he alleges a violation of § 510 of ERISA based on his alleged failure to vest in United's pension plan because of his discharge, defendants are entitled to summary judgment" as to that count. *Johnson* at 1432, citing *Logan v. St. Luke's-Roosevelt Hospital Center*, 636 F.Supp. 226; (S.D. N.Y. 1986). In the instant case, Petitioner was fully vested in all benefits to which he was entitled at the time of his retirement under Respondent's Pension Plan. (9a, Petitioner's Brief, p. A-14)

In another case cited by the District Court, *Kelly v. Chase Manhattan Bank*, 717 F.Supp. 227 (S.D. N.Y. 1989), a discharged employee brought an action which, in part, alleged that his termination deprived him of an opportunity to accrue additional benefits under his company's pension plan. The court noted that the employer had conceded that the plaintiff was fully vested in his pension plan at the time of his dismissal, and that the plaintiff's claim was that had he remained as an employee he would have accrued additional benefits. *Kelly* at 232. The court held that "such a claim is not cognizable under § 510." *Ibid.* citing *Dister v. Continental Group*, 859 F.2d 1108, 1111 (2nd Cir. 1988). In the instant case, Respondent readily concedes that Petitioner is fully vested in the pension plan for benefits earned up to the time of

Petitioner's election to take an early retirement. (9a, Petitioner's Brief, p. A-14) As in *Kelly*, Petitioner's claim is that had he remained an employee, he would have accrued additional benefits. As in the claim in *Kelly*, the claim in the instant case is not cognizable under § 510.

In *West v. Butler*, 621 F.2d 240 (6th Cir. 1980), the 6th Circuit Court of Appeals reviewed the legislative history behind ERISA § 510. The Court held that, in passing ERISA § 510, Congress intended to prohibit employers from taking negative action against employees who had not yet vested in their pension rights. *West* at 245. In the instant case, it is undisputed that the Respondent has in no way prevented Petitioner from obtaining his pension rights vested at the time of his retirement. (9a, Petitioner's Brief, p. A-14) Congress did not intend for employees with vested pension rights to have a cause of action under ERISA § 510. *West* at 245. Therefore, contrary to Petitioner's assertions, summary judgment is appropriate in the instant case without reaching an examination of the evidence produced by the Petitioner regarding employer intent in Petitioner's effort to meet his burden of proof. Since Petitioner is vested, he has no cause of action under ERISA § 510 and the petition for writ of certiorari should be denied.

CONCLUSION

Respondent contends that it is clear this is a case where the plaintiff has claimed damages based upon an alleged violation of § 510 of the Employee Retirement Income Security Act. A court may grant a summary judgment just as in other cases. Here Petitioner failed to make an adequate response to Respondent's motion and failed to show any causal link between Petitioner's alleged discharge and his pension benefits. Respondent made a clear showing that the reason for the change in his job status had nothing to do with his pension rights.

Further, Petitioner has no claim under ERISA § 510 since it does not apply to vested pension plan participants. For these reasons Respondent contends the petition for certiorari should be denied.

Respectfully submitted,

WALLACE E. HARRELL
Counsel of Record
GILBERT, HARRELL, GILBERT,
SUMERFORD & MARTIN, P.C.
777 Gloucester Street
Suite 200
Post Office Box 190
Brunswick, Georgia 31521-0190
(912) 265-6700

May 28, 1991

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

STATE OF GEORGIA)
)
COUNTY OF CAMDEN)

Deposition of JACK D. MALONE, taken on behalf of the defendant herein, pursuant to Agreement, at 10:00 o'clock a.m., on Wednesday, November 1, 1989, at Highway 40 East, Post Office Box 813, St. Marys, Camden County, Georgia before Karen G. Bondurant a Notary Public in and for the State of Florida at Large.

* * * *

Q And after you had thought about it, do you recall who you talked to about it when you decided that you would not take that job?

A Yes, sir, I do.

Q Who was that?

A I talked to Mr. John Love and Mr. Billy T. Sutton.

Q Do you recall when you talked with them, approximately?

A It was shortly before I retired. I had had a meeting with Mr. Love and Mr. Sutton earlier, and John had explained some of the options.

* * * *

Meeting With Jack Malone
4-22-86 @ 11:25 to 11:45 A.M.
Present:

Dominick Sorrentino
Lee Tompkins
B.T. Sutton
Jack Malone

1) Explained to Mr. Malone that Gilman felt that they could not offer him severance pay or early retirement with pay out at age 62.

2) Offered Mr. Malone the following options:

A) Retirement at his current age, with no severance pay.

B) A job in Accounting—with retraining under the Asst. Accounting Manager and a cut in pay of $6,000 per year. Explained that he could not make more than the Asst. Accounting Manager.

C) Explained that he could apply for LTD, and Mr. Tompkins and Mr. Love would aid in trying to get it approved.

Mr. Malone was not pleased at the options. He wanted to be the first in St. Marys Kraft Div. to be placed on full retirement (@ age 62—even if he is only 56) with severance pay is given to Kraft Bag employees (salary) when the Grocery Bag Dept. closed (3 months pay plus 1 week pay for each year worked up to a maximum of 1 year pay).

Jack Malone:

Questions asked by Guy Farmer to Lee Tompkins and Lee to Sutton.

Talked with Mike Pillen & D. Sorrentino on salary range and job duties.

1st Question:

Any employee under a Supervisor making more than the Supervisor?

Answer:

No

This is why Jack Malone is being requested to take a pay cut from $37,000 to $31,000.

Accounting Manager	47,850	M. F. Randolph
Asst. Acct. Manager	32,000	Hub Baez
Accountant	25,730	E. Buck
Jr. Accountant	31,000	Jack Malone
Accounting Clerks		

2nd Question:

What will be the duties of Jack Malone if he stays with the Company in this new job!!

Answer:

Mr. D. Sorrentino stated that he would handle Petty Cash, some journal duties, account payable items and other general duties * * *.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

AFFIDAVIT OF JACKIE D. MALONE

Personally, before the undersigned officer duly authorized by Georgia law to administer oaths and take acknowledgments, appeared JACKIE D. MALONE, who, after first having been duly sworn, deposes and says on oath as follows, to-wit:

1. My name is JACKIE D. MALONE. I am the Plaintiff in the above styled action.

2. I was formerly employed by the Defendant, GILMAN PAPER COMPANY, and was so employed until July 1, 1986. At the time of my last employment with GILMAN PAPER COMPANY, I was employed in the Accounting Department at GILMAN PAPER COMPANY'S St. Marys, Georgia, facilities. I had been employed in the Accounting Department for approximately twenty-five years. I was employed by GILMAN PAPER COMPANY for a total of thirty-two years.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

STATE OF GEORGIA)
)
COUNTY OF CAMDEN)

Deposition of DOMINICK RALPH SORRENTINO, taken on behalf of the plaintiff herein, pursuant to Agreement, at 1:20 o'clock p.m., on Wednesday, November 1, 1989, at Gilman Paper Company, St. Marys, Camden County, Georgia, before Karen G. Bondurant a Notary Public in and for the State of Florida at Large.

* * * *

Q Well, what were the circumstances under which you transferred to St. Marys?

A The financial MIS Group relocated down here in St. Marys, and I was part of the group.

Q Did Gilman still maintain an office in New York?

A Yes.

Q Where is the corporate headquarters of Gilman at the present time?

A Gilman Paper Company?

Q Yes, sir.

A I believe it is—it's down here at St. Marys, Georgia.

Q Well, before the financial MIS Group moved to St. Marys, where was the headquarters of Gilman?

A In New York City.

Q When did the change take place under which the financial MIS Group was transferred to St. Marys?

A I think it was July—June, July, August of '86.

Q What was the reason for the change which took place under which the financial MIS Group was moved from New York to St. Marys?

A Well, the reason was that it would be more convenient to be here and [eliminate]* duplication of efforts * * *

* * * *

CROSS EXAMINATION

BY MR. HARRELL:

Q (Handing document to witness) Mr. Sorrentino, I'd like to hand you an exhibit that has been marked as Defendant's Exhibit No. 2 and ask you if you recognize that document?

A (Examining document) Yes, I do.

Q That document concerns a meeting that apparently took place on April 22nd, 1986; is that right?

A That's correct.

Q And were you at that meeting?

A Yes, I was.

Q What do you recall about any conversation with Jack Malone at that meeting?

A I remember that Billy Sutton went through the options on [the paper with] Jack Malone asking—the options that are written here in this memo. And he went

---

* Bracketed material reflects corrections in witness deposition by Court Reporter.

through these three options very clearly, and the—whatever is written in the memo.

Do you want me to go through the options?

Q Yes, please.

A Well, he explained to Jack Malone that he could take retirement without any severance pay. He could either be the [Jr. Accountant]—work for Herb Baize, the assistant—which will be the assistant accounting manager, at a reduction in salary of $6,000, or he can go [out on] LTD, which is disability, if he like.

Q Was there any discussion about why his salary would have to be reduced?

A Yes. Mainly because the—Herb Baize was making less than he was, and Herb was the assistant manager. And we was making $6,000 [less]—Jack Malone was making $6,000 more than Herb Baize.

Q Was there any discussion about the conditions of employment, that is, how the—any training program would be instituted and the conditions that would be employed in connection with that training program?

A Not at that meeting, because it was a very short meeting. It was only 20 minutes, as you can see. Mr. Sutton just went through the options with Jack.

Q Did Mr. Malone make any response to—to this? Did he make any decision at that time?

A No, he didn't.

Q At that time, had you moved to St. Marys?

A No.

Q What was your reason for being at this meeting?

A I was at this meeting mainly because Herb Baize reports to me. And I guess that if Jack reported to Herb Baize, he would be basically under my division.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

STATE OF GEORGIA)
)
COUNTY OF CAMDEN)

Deposition of WILLIAM H. DAVIS, taken on behalf of the plaintiff herein, pursuant to Stipulation and Agreement, at 2:00 o'clock p.m., on Wednesday, November 1, 1989, at Gilman Paper Company, St. Marys, Camden County, Georgia before Karen G. Bondurant a Notary Public in and for the State of Florida at Large.

* * * *

Q. What knowledge do you have concerning the decision to move the financial operations of Gilman Paper Company from New York to St. Marys?

A I probably have as much as anybody.

Q What were the factors which caused Gilman Paper Company to move the financial operations from New York to St. Marys?

A Well, in the first place, office space is very expensive in New York. And we had leased the second floor of the Time and Life Building from I guess it's the Rockefeller

Estate interest that owned the Rockefeller Center until they sold it to the Japanese here in just the last couple of days.

Q Rockefeller Center?

A Rockefeller Center. The Time and Life Building is one of the buildings in Rockefeller Center. There's about 10 or 15 of them total.

Q And the rent was kind of high?

A Rent was high. And not only was the rent high, the rent had escalated dramatically since we signed the lease.

I think it was around $12 to $18 a square foot per year that we were paying for the space. And we had the opportunity to sublease it for $42 a square foot to someone else.

So there was quite a bit of money to be made by freeing up most of the space that we had leased, and it just made a lot of sense.

We were faced with a decision to put in a new computer and spend a couple million dollars on a computer system. And it made a lot of sense to make the move at that time and build a building down here to house that computer equipment and also to move our accounting and computer people to St. Marys.

* * * *

Q And the reason that the plan was terminated was so that Gilman could—Gilman Paper Company could get these, what you call, excess funding—excess funds?

A That's correct.

Q And once they're withdrawn, then, of course, they're no longer available to pay pensions to employees?

A We've already paid all the pensions to the employees when we give them the annuity and all the cash, so we ended our obligation.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

STATE OF GEORGIA)
)
COUNTY OF CAMDEN)

Deposition of JOHN M. LOVE, taken on behalf of the plaintiff herein, pursuant to Agreement, at 11:05 o'clock a.m., on Wednesday, November 1, 1989, at Highway 40 East, St. Marys, Camden County, Georgia, before Karen G. Bondurant a Notary Public in and for the State of Florida at Large.

• • • •

Q When did—approximately when did the current plain come into existence?

A I believe it was the first of '88—'87.

Q Now, prior to the first of '87, what plan were you a participant in?

A A similar plan for the salaried employees of Gilman Paper Company.

Q Now, was it salaried employees only in St. Marys or did it also include the St. Marys-based employees, or what employees did it include?

A It included all salaried employees of the company.

Q Were you a participant in the same plan which Jack Malone was a participant in at the time of his retirement?

A There wasn't—I don't want to be too technical on this, but there wasn't a plan in existence at the time that Mr. Malone actually went into retirement.

Q Were you a participant in the same plan with Mr. Malone one year prior to the date of his retirement?

A Yes.

Q And then that plan terminated?

A Yes.

Q And a new plan came into existence?

A Yes.

Q What is your understanding as to the reason the earlier plan terminated?

A The reason?

Q Yes, sir.

A It was an overfunded plan, similar to many other plans in our industrial and in other industries at that time.

Q When you say overfunded, what do you mean?

A There were excess funds to provide the benefits that the plan was to provide. They were—the actuary's assumptions had been somewhat conservative, and there were excess funds there which were not needed to provide the benefits that the plan called for.

• • • •

Q Are you aware of any decisions on the part of Gilman Paper Company to try to get management employees to take early retirement?

A What management employees?

Q Well, management employees based here in St. Marys.

A To take early retirement?

Q Yes.

A Related to this move?

Q Well, related to that move or just any other practice of the company to encourage management-level employees to take early retirement so as to cut costs.

A No, sir.

* * * *

Q You're saying the bag plant employees' jobs were no longer existing?

A Yes.

Q Mr. Malone's position was also being eliminated; wasn't it?

A Portions of it, yes. My understanding, at any rate.

Q There was a complete restructuring in the department where ha had been working so that he would have had to have retrained in order to remain an employee of Gilman; is that right?

A Yes.

Q Now, if Mr. Malone had continued to work until age 65, the pension benefits which he would have received each month at that time would be substantially greater than the benefits which he currently receives; is that not correct, sir?

A It would have been greater, certainly, yes.

Q What meetings did you sit in on or participate in where Mr. Malone was present and his future employment or employment options with the company were discussed?

A When Mr. Malone was present?

Q Yes, sir.

A I had at least one meeting with him, and I believe there were possibly two.

Q Do you recall the dates of those meetings?

A No, sir, I do not.

Q Did you make any notes or other records concerning those meetings?

A No, sir, I did not.

Q Tell me what you recall being discussed at this meeting or meetings where Mr. Malone was present.

A My best recollection is that the options that were available to Mr. Malone and what he desired to do about those options, and to try to explain to him in as much detail as I could what the options meant to him.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV289-096

JACKIE D. MALONE,
Plaintiff,

vs.

GILMAN PAPER COMPANY,
Defendant.

STATE OF GEORGIA)
)
COUNTY OF CAMDEN)

Deposition of MICHAEL PALLEN, taken on behalf of the plaintiff herein, pursuant to Agreement, at 3:00 o'clock p.m., on Wednesday, November 1, 1989, at Gilman Paper Company, St. Marys, Camden County, Georgia before Karen G. Bondurant a Notary Public in and for the State of Florida at Large.

* * * *

Q And you joined the company as a controller?

A Yes.

Q Did you have any role in the decision to move the accounting functions of Gilman Paper Company from New York to St. Marys?

A Yes.

Q What role did you have?

A There was a decision made that we should look into the benefits that could be accrued from combining the operations.

We were aware that there was duplication of certain efforts. And we also felt that by being closer to the

operations, that the accounting department and the finanical functions would be more effective.

And I was asked my opinion on that and was obviously a key player in that. And I came to the conclusion that this was in the best interest of the company and supported that plan.

Q Now, did that move have a significant effect on the job position which Jack Malone had held prior to the time that the accounting functions of Gilman were moved to St. Marys?

A I don't know if I understand your question.

Q Did the decision to move the accounting functions of Gilman Paper Company to St. Marys have an effect on Mr. Malone's position with the company?

A It did in the sense that we reevaluated all of the functions. We were bringing down certain staff, we were bringing down certain functions that had previously been performed in New York, and we were trying to meld requirements, eliminate certain duplications and match up people as best as we could with the new tasks that they were going to be doing.

Q Did you perfor many sort of study or make any inquiries as to exactly what Jack Malone did with Gilman Paper Company?

A I worked with my two key assistants, Dom Sorrentino and Billy Sutton in laying out who was going to be doing what, and what their opinions of people's abilities were. So I worked with them and relied on their feedback to me.

Q What did Mr. Sutton tell you concerning Mr. Malone in the job which he performed for Gilman?

A Mr. Sutton was rather disappointed in Mr. Malone's performance. He indicated that he had been happy —unhappy for an extended period of time. And he related the specific jobs that Mr. Malone was doing, which in my, you know, discussions with him and further pursuit, were basically clerical jobs.

* * * *